THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Administrative Law Court
The Honorable S. Phillip Lenski, Administrative Law Judge

Appellate Case No. 2016-000228

Bradley Sanders ..... Appellant,

v.

South Carolina Department of Motor Vehicles and
Columbia Police Department ..... Respondents.

INITIAL BRIEF OF THE RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF ISSUES ON APPEAL

I. THE HEARING OFFICER WAS CORRECT IN RULING THAT THE ARRESTING OFFICER LAWFULLY SOUGHT A BLOOD SAMPLE FROM THE APPELLANT UNDER S.C CODE 56-5-2950(a) WHERE HE FOUND THAT A LICENSED MEDICAL PROFESSIONAL MADE A DETERMINATION THAT THE APPPELLANT WAS UNABLE TO GIVE A BREATH SAMPLE PRIOR TO THE BLOOD TEST BEING OFFERED BY THE OFFICER.

II. THE HEARING OFFICER WAS CORRECT IN RULING THAT THE ARRESTING OFFICER ESTABLISHED THAT THE INDIVIDUAL WHO SIGNED THE URINE/BLOOD COLLECTION REPORT WAS A LICENSED MEDICAL PROFESSIONAL.

STATEMENT OF THE CASE

On November 21, 2012, Officer Desrochers of the Columbia Police Department was dispatched to the scene of a single-car collision (ALC ROA, p. 8, lines 13-19). Officer Desrochers found the Appellant, Bradley Sanders, standing nearby, bleeding from the head and smelling strongly of alcohol (ALC ROA, p. 8, line 19 – 9, line 9). The Appellant spoke with slurred speech and seemed both mentally and physically "off-balance." (ALC ROA, p. 9, lines 9-15). The Appellant was transported to Lexington Medical Center, where Nurse Angela Albright informed Officer Desrochers that Appellant was physically unable to submit to a breath test (ALC ROA, p. 9, lines 15-19; p. 10, lines 9-22; and p. 13, lines 6-9). Officer Desrochers arrested Appellant for an offense arising out of an act alleged to have been committed while he was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs (ALC ROA, p. 13, line 16). Officer Desrochers read Appellant his Miranda rights, and advised Appellant of his Implied Consent Rights, both in writing and verbally (ALC ROA, p. 13, lines 15-22). Then, due to Appellant's inability to provide a breath sample, Officer Desrochers asked Appellant to submit to a blood sample (ALC ROA, p.

13, lines 6-13 and p. 13, lines 20-23). Appellant refused to provide a blood sample (ALC ROA, p. 13, lines 12-13 and p. 13, lines 20-23). Upon refusal to submit to a blood sample, Appellant was found to be in violation of S.C. Code Ann. § 56-5-2950, and Officer Desrochers issued a Notice of Suspension form pursuant to S.C. Code Ann. § 56-5-2951 (ALC ROA, p. 13, line 23 and p. 56-57).

Appellant timely requested a contested case hearing which was held on March 5, 2013 (ALC ROA, p. 56-57). After reviewing the record and considering all the evidence, the Office of Motor Vehicle Hearings (OMVH) Hearing Officer issued an order affirming the suspension of the Appellant's driver license (ALC ROA, p. 34-42).

An appeal was timely filed in the Administrative Law Court (ALC) on March 3, 2015 (Notice of Appeal dated February 5, 2016). By Amended Final Order filed January 27, 2016, the Administrative Law Court ordered that the OMVH Final Order and Decision dated February 13, 2015, sustaining the suspension of Appellant's driver's license or driving privilege be affirmed (Amended Final Order filed January 29, 2016).

This appeal followed.

STANDARD OF REVIEW

The scope of judicial review in cases such as this is limited by the Administrative Procedures Act, S.C. Code Section 1-23-380(A)(6).

> (A) A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review....
>
> (6) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
>
> (a) In violation of constitutional or statutory provisions;

(b) In excess of the statutory authority of the agency;
(c) Made upon unlawful procedure;
(d) Affected by other error of law;
(e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
(f) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

In *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981), our Supreme Court set out the standard of evidentiary review under the South Carolina Administrative Procedure Act:

> [Section 1-23-380(g)(5)] specifically states: "The Court shall not substitute its judgment for that of the agency as to the weight of evidence on questions of fact." In addition, the statute states the decision under appeal must be "clearly erroneous" in view of the substantial evidence on the whole record.
>
> We, therefore, caution the Bench and Bar as to the limitations upon the application of the "substantial evidence" rules in reviewing the decision of administrative agencies. As stated in *Dickinson-Tidewater, Inc. v. Supervisor of Assess.*, 273 Md. 245, 329 A.2d 18, 25, the substantial evidence test "need not and must not be either judicial fact-finding or substitution of judicial judgment for agency judgment"; and a judgment upon which reasonable men might differ will not be set aside.

The Court further noted that:

> The substantial evidence rule... means that we will not overturn a finding of fact by an administrative agency "unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based." (Citation omitted.)

See also *Schudel v. South Carolina Alcoholic Beverage Control Commission*, 276 S.C. 138, 276 S.E.2d 308 (1981); *Fast Stops, Inc. v. Ingram*, 276 S.C. 593, 281 S.E.2d 18 (1981).

An appeal from action of an administrative agency must be sustained if supported by substantial evidence. *Hamm v. American Telephone & Telegraph Co.*, 302 S.C. 211, 394 S.E.2d 842 (1990); *Lark v. Bi Lo, Inc.*, *supra*. In *Lark*, our Supreme Court quoted

Consolo v. Federal Maritime Commission, 383 U.S. 611, 16 L.Ed.2d 131, 86 S.Ct. 1118 (1966), to define substantial evidence:

> We have defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."... "It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury..." This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.

Lark, 276 S.C. at 136, 276 S.E.2d at 311. *See, also, Dorman v. DHEC*, 565 S.E.2d 119, 350 S.C. 159 (Ct. App. 2002); *Hamm v. South Carolina Public Service Commission and Wild Dunes Utilities, Inc.*, 311 S.C. 295, 422 S.E.2d 118 (1992).

A court cannot weigh the evidence and substitute its judgment for that of the agency upon a question as to which there is room for a difference of intelligent opinion. *Dorman v. DHEC, supra*; Hamm *v. American Telephone & Telegraph Co., supra*; *Chemical Leaman Tank Lines v. South Carolina Public Service Commission*, 258 S.C. 518, 189 S.E.2d 296 (1972). The limited substantial evidence standard of review is intended only to assure that the agency's action is properly supported and that, therefore, no abuse of delegated authority occurred. *See Fowler v. Lewis*, 260 S.C. 54, 194 S.E.2d 191 (1973).

On review of the acts or orders of administrative agencies, the courts will presume, among other things, that the agency action is regular and correct, and that the orders and decisions of the agency are valid and reasonable. 73A C.J.S. *Public Administrative Law and Procedure* Section 220(a) (1983). Therefore, the burden is on the Petitioner to show convincingly that the order of the agency is without evidentiary

support or is arbitrary or capricious as a matter of law. *Hamm v. South Carolina Public Service Commission*, 294 S.C. 320, 364 S.E.2d 455 (1988).

ARGUMENT

Appellant's Brief widely misses the mark with regard to what must be proven to sustain a suspension arising out of a refusal to submit to implied consent testing under S.C. Code §56-5-2950. Pursuant to S.C. Code §56-5-2951(F) the:

> ...scope of the hearing is limited to whether the person:
> (1) was lawfully arrested or detained;
> (2) was given a written copy of and verbally informed of the rights enumerated in Section 56-5-2950; [and]
> (3) refused to submit to a test pursuant to Section 56-5-2950;...

S.C. Code §56-5-2951(F). See also *SCDMV v. Nelson*, 364 S.C. 514, 613 S.E.2d 544 (2005) (stating that an administrative hearing is to determine if the person violated the implied consent laws, and "because Nelson did not consent to testing, the scope of the hearing was limited to whether Nelson (1) was lawfully arrested, (2) was advised in writing of his section 56-5-2950 rights, and (3) refused to submit to a test."). Appellant repeatedly attempts to confuse the legal issues before this Court by arguing that the OMVH Hearing Officer relied on hearsay evidence that the Appellant was unable to submit to a breath test and hearsay evidence that this determination came from a licensed medical personnel as required by S.C. Code §56-5-2950(A). Appellant's argument fails to recognize that the statements made by Nurse Albright to Officer Desrochers regarding Appellant's inability to submit to a breath test and Officer Desrochers' testimony regarding Nurse Albright's qualifications as a licensed medical personnel pursuant to S.C. Code §56-5-2950 simply do not constitute hearsay in the context of an implied consent administrative hearing.

I. THE HEARING OFFICER WAS CORRECT IN RULING THAT THE ARRESTING OFFICER LAWFULLY SOUGHT A BLOOD SAMPLE FROM THE APPELLANT UNDER S.C CODE 56-5-2950(a) WHERE HE FOUND THAT A LICENSED MEDICAL PROFESSIONAL MADE A DETERMINATION THAT THE APPPELLANT WAS UNABLE TO GIVE A BREATH SAMPLE PRIOR TO THE BLOOD TEST BEING OFFERED BY THE OFFICER.

In an administrative hearing involving a motorist's refusal to provide a blood sample for a blood alcohol test, the State is required to demonstrate that law enforcement properly requested a blood sample from the motorist. See *Peake v. S.C. Dep't of Motor Vehicles*, 375 S.C. 589, 654 S.E.2d 284 (Ct. App. 2007). S. C. Code §56-5-2950(A) sets forth the circumstances under which a blood sample may properly be requested. It provides in pertinent part:

> At the direction of the arresting officer, the person first must be offered a breath test to determine the person's alcohol concentration. If the person is unable to provide an acceptable breath sample because he has an injured mouth, is unconscious or dead, or for any other reason considered acceptable by the licensed medical personnel, the arresting officer may request a blood sample be taken.

S. C. Code §56-5-2950(A) (Emphasis added). In the instant case, the Officer Desrochers testified that he was told by Nurse Albright that the Appellant would not be able to provide a breath sample (ALC ROA, p. 9, lines 15-19; p. 10, lines 9-22; and p. 13, lines 6-9). Officer Desrochers further testified that he offered the Appellant a blood test because it was established that the Appellant would be unable to get to a Datamaster in time to take a breath test due to his injuries and required treatment (ALC ROA, p. 13, lines 8-20). The Appellant refused to submit to a blood test (ALC ROA, p. 13, lines 12-13 and p. 13, lines 20-23). Officer Desrochers also offered into evidence the SLED

Blood/Urine Collection Report signed by Nurse Albright, which indicated Appellant could not submit to a breath test for medical reasons (ALC ROA, p. 10, lines 17-21).[1]

Appellant argues that the OMVH Hearing Officer relied on hearsay evidence that the Appellant was unable to submit to a breath test. SCDMV asserts the OMVH Hearing Officer and ALC Judge correctly found that the testimony presented by Officer Desrochers did not constitute hearsay, Respondent met the burden of proof, the request for a blood sample was lawful, and that the Appellant refused to provide the requested blood sample. SCDMV asserts that Officer Desrochers testimony regarding Nurse Albright's determination that Appellant was physically unable to provide an acceptable breath sample was not hearsay because whether Appellant was actually able or unable to physically provide an acceptable breath sample was wholly irrelevant for purposes of this hearing, i.e. it was not offered to prove the truth of the matter asserted in this case.

This issue has already been address on point in the case *Alexander William Cann v. South Carolina Department of Motor Vehicles and South Carolina Department of Public Safety*, 2013 WL 1703702 (SCALC 2013). In the *Cann* case, the ALC held that a trooper's testimony that a doctor advised him that Cann was unable to leave the hospital was not hearsay since it was not admitted to prove that Cann was actually unable to leave. *Id.* at 3. The ALC further held that the testimony was admitted to show that the trooper's request for a blood test was warranted under the statute because a licensed medical personnel had determined the Cann was unable to provide a breath sample. *Id.* The ALC in the *Cann* case also held that the SLED Urine/Blood Collection Report also did not

[1] Unless otherwise noted, all references to "statements" made by Nurse Albright refer to both the oral statement that Appellant would not be able to provide a breath sample and to the SLED Blood/Urine Collection Report signed by Nurse Albright.

constitute hearsay because it "was not admitted to prove that Cann was unable to take a breath test at the time but rather to show Trooper Turner was justified in requesting a blood sample be taken." *Id.* The facts in this case are exactly the same and this Court should following the logic and reasoning of the *Cann* decision.

Backing up the logic and reasoning of the *Cann* decision is Rule 801(c), SCRE which defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Emphasis added. In this case, there is no debate between the parties about whether Appellant was actually able or unable to physically provide an acceptable breath sample. Furthermore, as set forth in S.C. Code §56-5-2951(F) the scope of an implied consent violation hearing:

> ...is limited to whether the person:
> (1) was lawfully arrested or detained;
> (2) was given a written copy of and verbally informed of the rights enumerated in Section 56-5-2950; [and]
> (3) refused to submit to a test pursuant to Section 56-5-2950;...

Thus, by statute, the matter asserted in this type of hearing is whether: 1) the driver was lawfully arrested or detained; 2) the driver was given a written copy of and verbally informed of the rights enumerated in Section 56-5-2950; and 3) the driver refused to submit to a test pursuant to Section 56-5-2950, not whether the driver was actually physically able or unable to submit to provide an acceptable breath sample. Only because a blood test was requested by Officer Desrochers did the OMVH Hearing Officer entertain any testimony regarding why Officer Desrochers requested the blood test. This is because S.C. Code §56-5-2950(A) only allows the arresting officer to request a blood sample "If the person is unable to provide an acceptable breath sample

because he has an injured mouth, is unconscious or dead, or for any other reason considered acceptable by the licensed medical personnel..." S. C. Code §56-5-2950(A) (Emphasis added). In fact, the OMVH Hearing Officer specifically stated that he would allow the statements into evidence, "but not for the truth of the matter asserted, just that you [Officer Desrochers] was told that." (ALC ROA, p. 9, line 23 – p. 10, line 1).

Similarly, the Department of Revenue does not sanction a liquor store based on an allegation by a citizen that the store was open at 8:00 p.m., nor does law enforcement arrest a person based solely on a report that the person was seen doing a drug deal at a place known to be a drug hangout. Statements such as these would, however, be sufficient to justify the agency or law enforcement officer making further inquiry. Courts of this State have repeatedly held that out-of-court statements are not hearsay if they are offered for the limited purpose of explaining why a government investigation was undertaken. *State v. Brown*, 317 S.C. 55, 63, 451 S.E. 2d 888, 894 (1994) (Evidence is not hearsay unless it is an out of court statement offered to prove the matter asserted and an out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken); *State v. Rice*, 375 S.C. 302, 324, 652 S.E. 2d 409, 420 (Ct. App. 2007), *rev'd on other grounds*, 392 S.C. 438, 710 S.E 2d 55 (2011)[2] (The hearsay rule does not require exclusion of testimony about what an investigating officer learns from his investigation. The purpose of the officer's repetition of the out of court statement was not to prove the matter asserted, but to

[2] Although wholly unrelated to this case, the undersigned takes this brief moment to note that the body of the victim in the *Rice* case was first discovered by Deputy Tom Lyons, a remarkable law enforcement officer with several decades of law enforcement service throughout the State of South Carolina. Deputy Lyons tragically passed away in March 2016 after a long and painful battle with cancer. Deputy Lyons is greatly missed by his family, friends, coworkers, and the undersigned.

suggest the Defendant's state of mind about surrendering her fingerprints); *State v. Thompson*, 352 S.C. 552, 575 S.E.2d 77 (Ct. App. 2003) (Testimony concerning a statement from a bystander to the police was not hearsay, because it was not offered to prove the matter asserted, but rather to explain and outline the investigation and the officer's reason for going to the defendant's home). In this case, the OMVH Hearing Officer explicitly stated that Nurse Albright's statements would be admitted into evidence, "not for the truth of the matter asserted, just that you [Officer Desrochers] was told that" Appellant would be unable to take a breath test (ALC ROA, p. 9, line 23 – p. 10, line 1). Thus, the clear implication of this ruling is that the OMVH Hearing Officer was not admitting Nurse Albright's statements to prove that Appellant was actually physically unable to provide an acceptable breath sample, but was admitting her statements to explain why Officer Desrochers requested Appellant submit to a blood test.

Appellant argues Nurse Albright's statements were "used to prove the truth of the matter asserted" by stating the matter asserted in this case was that "Appellant could not leave the hospital," and, therefore, "could not provide a breath sample," and "Officer Desrochers relied upon the statements as being the truth." (Brief of Appellant, p. 12). Again, this argument blindly ignores the statutory limits on the scope of this hearing. As mentioned previously, pursuant to S.C. Code §56-5-2951(F) the:

> ...scope of the hearing is limited to whether the person:
> (1) was lawfully arrested or detained;
> (2) was given a written copy of and verbally informed of the rights enumerated in Section 56-5-2950; [and]
> (3) refused to submit to a test pursuant to Section 56-5-2950;...

S.C. Code §56-5-2951(F). See also *SCDMV v. Nelson*, 364 S.C. 514, 613 S.E.2d 544 (2005) (stating that an administrative hearing is to determine if the person violated the

implied consent laws, and "because Nelson did not consent to testing, the scope of the hearing was limited to whether Nelson (1) was lawfully arrested, (2) was advised in writing of his section 56-5-2950 rights, and (3) refused to submit to a test."). Therefore, the only matters asserted to the OMVH were:

> 1) That Appellant was lawfully arrested or detained;
> 2) That Appellant was given a written copy of and verbally informed of his rights enumerated in Section 56-5-2950; and
> 3) That Appellant refused to submit to a blood test pursuant to Section 56-5-2950.

Many, many cases support testimony regarding out of court statements being testified to by someone other than the declarant so long as the testimony is not offered to prove the truth of the matter asserted in the statement. See *In re Cliquot's Champagne*, 70 U.S. 114 (1865) (In libel action against wine allegedly imported under false invoice of market values in violation of revenue law, a "price-current" obtained by investigator from wine dealer other than exporter was not hearsay); *State v. Lewis*, 293 S.C. 107, 110-111, 359 S.E.2d 66, 68 (1987) ("Bellamy's testimony regarding what third parties told him as to Lewis's alleged threats to kill him was not hearsay as it was not offered to prove that Lewis intended to kill him. Rather it was offered to show Bellamy's state of mind, that is, the reason he bought a gun and had it with him on the night of the murder."); *Watson v. Wall*, 239 S.C. 109 (1961) (Admission of written statement of doctor certifying that grantor was mentally and physical capable of executing any legal papers was not improper, where issue in the case was not the correctness of the doctor's statement, but whether grantee's conduct in transaction was fraudulent); *State v. Blurton*, 342 S.C. 500, 510, 537 S.E.2d 291, 296 (Ct. App. 2000) ("Blurton's counsel did not offer evidence that Mayfield represented himself to be a former Navy SEAL to prove Mayfield actually was one. In fact it is undisputed that Mayfield was never a Navy SEAL. The evidence was

offered, in part, to corroborate Blurton's testimony that Mayfield told him and he believed Mayfield was a former SEAL. Therefore, the evidence should not have been excluded as hearsay."); *Sams v. McCaskill*, 282 S.C. 481, 485, 319 S.E.2d 344, 347 (Ct. App. 1984) ("The hearsay rule does not apply where the purpose of offering an extrajudicial statement is not to prove the truth of the statement but merely to prove the fact that it was made and the circumstances under which it was made...") (Emphasis added); *Hatfield v. Van Epps*, 358 S.C. 185, 192, 594 S.E.2d 526, 530 (Ct. App. 2004) (In malpractice litigation, trial court should have allowed the introduction of twenty affidavits that were submitted by the Defendant as legal representative of the Plaintiff to the Family Court at a temporary hearing to "show the extent of Law Firm's alleged negligence in failing to call any of these witnesses at the final hearing."); State v. Kirby, 325 S.C. 390, 481 S.E.2d 150 (Ct. App. 1996) ("We find Lt. McGlocklin's testimony concerning the dispatcher's announcement was not offered for the truth of the matter asserted, but rather, served only to explain the reason for the initiation of police surveillance of the vehicle in question. Therefore, we hold the testimony was not hearsay and was properly admitted."); *Floyd v. Floyd*, 365 S.C. 56 (Ct. App. 2005) (Letters written by attorneys were not hearsay because the letters were introduced into evidence not to prove the truth of the attorneys' statements, but to show trustee was placed on notice of the beneficiary's position); *R & G Const., Inc. v. Lowcountry Regional Transp. Authority*, 343 S.C. 424 (Ct. App. 2000) (Closure letter and soil analysis report were not hearsay as they were not admitted for the truth of the matters asserted within them, but, rather, were offered to show that construction company completed all acts precedent to receiving payment); *Butler v. Gamma Nu Chapter of Sigma Chi*, 314 S.C. 477 (Ct. App.

1994) (Fraternity official's letter to residence hall director recommending that fraternity member be removed from the residence hall on the ground that he was a danger "to other brothers and university property" was not hearsay in action against fraternity by student who was assaulted by that member in a portion of the residence hall under the fraternity's jurisdiction because the letter was not offered to prove the truth of the matter asserted, but was admitted solely to prove notice); *Cloaninger ex rel. Estate of Cloaninger v. McDevitt*, 555 F.3d 324 (4th Cir. 2009) (Deposition testimony and police reports, which indicated that a doctor called 911 and told a dispatcher that detainee had threatened suicide, was not hearsay since content was offered to explain the subsequent conduct of deputies rather than to prove the matter asserted); *Taylor v. Molesky*, 63 Fed.Appx 126 (4th Cir. 2003) (Copies of ex parte order and protective order entered by state court, which detailed charges by former girlfriend against arrestee and which resulted in keeping arrestee away from his son, were not hearsay because they were offered to show their effect on arrestee's emotional state); *Lyons Partnership, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789 (4th Cir. 2001) (In a trademark infringement action brought by a costume rental company, evidence that children who saw costume thought costume depicted popular children's television character and of newspaper clippings in which reporters had erroneously identified costume as a depiction of character were not hearsay because they were offered not to prove truth of the matter asserted, but, rather, were offered to prove that children and newspaper reporters had expressed their believe that costume depicted character); *Arrington v. E. R. Williams, Inc.*, 490 Fed.Appx. 540 (4th Cir. 2012) (Statements from federal contractor's clients and employees, complaining about performance of plaintiff African American employee, were not hearsay in §1981

action alleging that termination of plaintiff's employment was based on race because statements were not offered for their truth, but were offered to explain why contractor believed terminating plaintiff was necessary and appropriate); *Thomas v. Dootson*, 377 S.C. 293 (Ct. App. 2008) (Surgical technician's testimony that doctor had been warned that surgical drill was hot prior to patient's burn injury to his mouth during oral surgery was not hearsay at medical malpractice trial because testimony was not offered to prove surgical drill was hot, but was offered to prove that doctor had notice that drill was hot); *Fields v. Regional Medical Center Orangeburg*, 354 S.C. 445 (Ct. App. 2003) (Medical expert's testimony that he was not board certified in emergency medicine because he was the first president of the Board of Emergency Medicine and that the opinion of legal counsel was that there may be a conflict of interest if he had taken the exam was not hearsay because the statement was not offered to prove that the legal counsel was correct that there would be a conflict of interest, but, rather, was offered to explain why the expert did not take the test and as a result why expert was not board certified); *Baber v. Greenville County*, 327 S.C. 31 (1997) (In former county employee's whistleblower suit, testimony that county had criticized former employee's job performance was not hearsay because the testimony was elicited to prove former employee had notice of poor job performance, not that former employee actually performed poorly); *U.S. v. Cain*, 586 Fed.Appx. 104 (4th Cir. 2014) (Fake prescriptions created by defendant and his co-conspirators were not hearsay in drug prosecution because the government did not offer the prescriptions into evidence to prove the truth of any matter asserted); *U.S. v. Edelen*, 561 Fed.Appx. 226 (4th Cir. 2014) (In prosecution for conspiracy to kidnap, text message received by defendant stating bank manager was not home one day before defendant and

his co-conspirators attempted to hold her son hostage in order to gain access to a vault were not hearsay because the message was not offered to prove manager's physical location, but to form a link between defendant and message's sender and to support the inference that defendant had access to information about manager prior to commission of offense); *U.S. v. Hassan*, 742 F.3d 104 (4th Cir. 2014) (Cooperating witness's testimony about his phone conversation with defendant's father was not hearsay where testimony was introduced to show basis for witness's believe that defendant's father was angry with him and to explain the cessation of witness's relationship with defendant); *U.S. v. Ibisevic*, 675 F.3d 342 (4th Cir. 2012) (In prosecution for bulk cash smuggling, defendant's mother's testimony that defendant, after signing a Customs and Border Protection (CBP) form, told her that CBP officers were asking about insurance value of his checked luggage was not hearsay where the testimony was offered not to prove that defendant actually was asked about the value of his checked luggage, but, rather, to prove that defendant expressed his belief that he was being asked about the value of his checked luggage); *State v. Vick*, 384 S.C. 189 (Ct. App. 2009) (Witness's testimony regarding a telephone conversation she heard between defendant's mother and victim was not offered for the truth of the matter asserted and was, therefore, not hearsay; the conversation simply related that victim did not have time to fix defendant's hair at the request of defendant's mother); *U.S. v. Hodge*, 295 Fed.Appx. 597 (4th Cir. 2008) (Allegations and ordering language in cease and desist order served on mail fraud defendant was not hearsay because the order was not introduced for the truth of the matter asserted but, rather, to establish that defendant was on notice of allegations and ordering language set forth in the cease and desist order, and, nonetheless, continued uninterrupted in her

activities); *U.S. v. Rodriquez*, 94 Fed.Appx. 139 (4th Cir. 2004) (Police sergeant's testimony regarding results of fingerprint report was not hearsay because it was not offered to prove the matter asserted, which was that there were no fingerprints on the weapon, but, rather, for the limited purpose of explaining why the government did not present any fingerprint evidence in the case); and State v. Miller, 197 N.C.App. 78, 676 S.E.2d 546 (NC.App. 2009) (In murder trial, questions from detectives to defendant that included statements attributed to nontestifying third parties were not hearsay where they were offered not for the truth of the matter asserted, but so that the jury could understand the circumstances in which the defendant was caught in a lie, changed his story, and made significant admissions of fact).

Appellant cites several cases in support of his argument that Nurse Albright's statements are hearsay. All of these cases are distinguishable from this case for multiple reasons. First, Appellant cites *State v. Stacy*, 315 S.C. 105, 431 S.E.2d 640 (Ct. App. 1993). It is unclear how Appellant believes the *Stacy* case supports his argument that Nurse Albright's statements were inadmissible hearsay. The holding in the *Stacy* case was that the need for additional medical treatment is an acceptable reason for licensed medical personnel to determine a person is physically unable to provide an acceptable breath sample to law enforcement. In fact, the *Stacy* case did not deal with the issue of any alleged hearsay. The licensed medical personnel that determined Stacy could not give a breath sample testified in Stacy's felony driving under the influence trial and the purpose of that testimony was to lay the foundation for the admission of the blood test results coming into evidence, not to explain a refusal to submit to the blood test. So, the *Stacy* case has no relevance to the issues raised by Appellant in this case.

Next, Appellant relies on *City of Columbia v. Moore*, 318 S.C. 292, 457 S.E.2d 346 (Ct. App. 1995) to argue that the arresting officer's testimony that "...someone at the hospital told him Moore could possibility be in the hospital all night for observation" means the testimony in this case was not sufficient to support the OMVH Hearing Officer's findings. This argument fails to recognize multiple, significant differences between this case and the *Moore* case. First, in this case we know who told Officer Desrochers that Appellant could not physically provide an acceptable breath sample: Nurse Albright. In the *Moore* case, the officer merely testified "...someone at the hospital told him Moore could possibly be at the hospital all night for observation." Second, Nurse Albright signed the SLED Blood/Urine Collection Report indicating that Appellant could not provide a breath sample. It appears that only the officer filled out the "Chem 001" form in the *Moore* case. Third, in the *Moore* case a blood sample was actually obtained, tested, and used in Moore's criminal prosecution. So, the objectionable testimony was used to lay the foundation for the blood test results to come into evidence. In this case, Appellant refused to submit to the blood test. Finally, the Court in the *Moore* case stated the "sole issue on appeal is whether the blood sample results were properly admitted into evidence..." In this case, because Appellant refused to submit to the blood test there are no blood test results. So, the very issue in the *Moore* case was the admissibility of the blood test results in Moore's criminal trial, not whether Moore had refused to submit to the blood test. In *Moore*, the Court concluded that the blood test results were not admissible because the officer "concluded Moore was unable to provide an acceptable breath sample and ordered a blood sample," rather than licensed medical personnel determining Moore was unable to provide an acceptable breath

sample. That is clearly not the case here. In this case, Nurse Albright, not Officer Desrochers, determined Appellant would be physically unable to provide an acceptable breath sample and signed the SLED Blood/Urine Collection Report to indicate the same. Therefore, the *Moore* case is also of little guidance to the Court on the issue raised by Appellant in this case.

Appellant then turns to the case *State v. Kimbrell*, 326 S.C. 344, 481 S.E.2d 456 (Ct. App. 1997), yet another criminal prosecution for driving under the influence, rather than an implied consent administrative challenge. With this case, Appellant argues the determination that a person cannot give an acceptable breath sample must be made by medical personnel, not the arresting officer. In the *Kimbrell* case, the officer asked Kimbrell to submit to a blood test because the officer observed blood in Kimbrell's teeth. In *Kimbrell* the Court held that even "where there in an indication of an injury to the mouth, however, the statute still requires a determination that the accused is physically unable to provide an acceptable breath sample." *Id.*, 326 at 348. Further, in the *Kimbrell* case, the Court held that where

> the evidence establishes that accused has an obvious injury to the mouth that the arresting officer reasonably believes will interfere with providing an acceptable breath sample, the officer may order a blood test to be taken. Whether or not the officer's belief is reasonable will, of course, depend upon the circumstances of each case.
>
> Because there is no evidence to support the conclusion that Trooper Weaver reasonably believed Kimbrell was physically unable to provide an acceptable breath sample... the blood test should have been suppressed.

Id., 326 at 349. Again, in this case, Nurse Albright, not Officer Desrochers, determined Appellant would not be able to provide a breath sample and signed the SLED Blood/Urine Collection Report to indicate the same. Further, there is no indication that

Nurse Albright made her determination related to any injury to Appellant's mouth. Rather, the testimony was that Nurse Albright determined Appellant would not be able to leave the hospital to provide a breath sample due to medical reasons (ALC ROA, p. 10, lines 17-21). Therefore, the *Kimbrell* case is also of little guidance to the Court on the issue raised by Appellant in this case.

Next, Appellant finally turns to a case that dealt with the administrative challenge to an implied consent suspension: *Peake v. South Carolina Dept. of Motor Vehicles*, 375 S.C. 589, 654 S.E.2d 284 (Ct. App. 2007). Again, however, Appellant's reliance is ill-placed. In *Peake*, the issue was "whether the circuit court erred in finding Trooper Manley properly requested a blood test despite the absence of any opinion by licensed medical personnel that Peake was unable to provide a breath sample as required by the implied consent statute." *Id.* 375 at 595. The Court held "We find no substantial evidence establishing Trooper Manley's compliance with the procedure mandated in section 56-5-2950(a)." *Id.* In *Peake*, Trooper Manley appeared and testified that he requested the blood sample because Peake was "not able to give a breath sample due to his condition" and the record contained no explanation of Peake's condition. *Id.* 375 at 592. In explaining its' ruling the Peake Court stated "Although this court in Moore held the inability to leave a medical facility could form a legally sufficient basis for ordering a blood test, we expounded the record must show this determination is based on the opinion of licensed medical personnel." *Id.* 375 at 603. Emphasis added. Officer Desrochers did exactly what the *Peake* Court asked officers to do in cases like this: provide evidence to the Court that a licensed medical personnel determined the Appellant could not leave a medical facility. Unlike Trooper Manley in the *Peake* case, Officer

Desrochers testified Nurse Angela Albright informed him that Appellant was physically unable to submit to a breath test (ALC ROA, p. 9, lines 15-19; p. 10, lines 9-22; and p. 13, lines 6-9). Officer Desrochers further testified that he offered the Appellant a blood test because it was established by Nurse Albright's statements to him that the Appellant would be unable to get to a Datamaster in time to take a breath test due to his injuries and required treatment (ALC ROA, p. 13, lines 8-20). Additionally, Officer Desrochers offered into evidence the SLED Blood/Urine Collection Report signed by Nurse Albright, which indicated Appellant could not submit to a breath test for medical reasons (ALC ROA, p. 10, lines 17-21). Appellant's Brief even acknowledges this evidence was before the OMVH Hearing Officer and merely notes that Appellant objected to the testimony being admitted because he believed the testimony to be hearsay (Brief of Appellant, p. 9). Despite these objections, the testimony was admitted, not for the truth of the matter asserted, but for the fact that Officer Desrochers was told that by Nurse Albright (ALC ROA, p. 9, line 24 – p. 10, line 1). For the reasons discussed previously in this Brief, Respondent asserts this testimony was not hearsay and was properly before the OMVH Hearing Officer. So, there is no question a licensed medical personnel is the one that determined Appellant could not submit to a breath test. For these reasons, SCDMV asserts that Officer Desrochers did exactly what the *Peake* Court requires in cases such as this and the *Peake* case in no way supports the issues placed before this Court by Appellant.

Appellant then turns to out of state cases to support his argument that Officer Desrocher's testimony regarding Nurse Albright's determination was hearsay. First, Appellant cites the case *Heuton v. Commissioner of Public Safety*, 541 N.W.2d 361

(Minn. Ct. App. 1995). Heuton dealt with a blood draw for a driver that had been seriously injured in a collision, was found semiconscious thrown from her vehicle, and when the officer tried see the driver at the hospital the officer was told "the doctor would not allow him to see Heuton, and... a paramedic told [officer] that Heuton's injuries were life threatening." *Id.* 541 at 363. Unlike this case, however, in *Heuton*, part of what the Commissioner had to prove "by a preponderance of the evidence [was] that Heuton was incapable of refusal." *Id.* 541 at 364. That is simply not part of the State's burden of proof in this case. As mentioned many times before, according to state statute the scope of this hearing is limited to whether Appellant:

> (1) was lawfully arrested or detained;
> (2) was given a written copy of and verbally informed of the rights enumerated in Section 56-5-2950; [and]
> (3) refused to submit to a test pursuant to Section 56-5-2950;...

S.C. Code §56-5-2951(F). Appellant's argument appears to be that because Nurse Albright determined that Appellant would be physically unable to provide an acceptable breath sample, the scope of this hearing automatically expanded to include the State being required to prove that Appellant truly would not be physically able to provide an acceptable breath sample ("The statements of Ms. [sic] Albright presented by Officer Desrochers were undeniably introduced to satisfy the threshold question of whether or not Appellant could submit to a breath test." [Brief of Appellant, p. 13]). That is simply not true. In a case such as this, all that needs to be proven is that a licensed medical personnel made such a determination, not that the determination was necessarily correct or incorrect. This is why, at the heart of it, Appellant's argument fails in this case. This is also why the *Heuton* case doesn't support Appellant's argument in this case. In *Heuton*, part of what the Commissioner had to prove "by a preponderance of the evidence

[was] that Heuton was incapable of refusal," i.e. the Commissioner had to prove that Heuton truly was incapable of refusal, that the medical determination that Heuton was incapable of refusal was an accurate determination. Therefore, testimony only from the officer about what he had been told by medical personnel about Heuton's condition did constitute hearsay because whether Heuton was incapable of refusal or not was one of the things the Commissioner had to prove. That is not the case here and for these reasons, Appellant's reliance on the *Heuton* case is misplaced. [3]

Similarly, Appellant relies on *State v. Anger*, 105 Hawai'i 423, 98 P.3d 630 (Hawai'i 2004). Appellant's reliance on the *Anger* case is misplaced for the same reasons it was misplaced in the *Heuton* case. In the *Anger* case, one of the things that was required to be proven by the State was "that Anger had, in fact, suffered an injury in the motor vehicle accident." *Id.* 105 at 432. Therefore, the officer's testimony in the *Anger* case was that a physician told him Anger was injured was hearsay because injury was one of the elements that had to be proven to justify the blood draw. In a case such as the one before this Court, all that needs to be proven is that a licensed medical personnel made such a determination that Appellant was physically unable to provide an acceptable breath sample, not that the determination was necessarily correct or incorrect. This is why Appellant's argument fails in this case and is why the *Anger* case doesn't support Appellant's argument in this case.

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[3] Interestingly, Heuton's suspension was ultimately upheld based on the fact that medical personnel prevented Officer Clark from gaining the personal knowledge regarding Heuton's medical condition that he sought and Deputy Mulvehill, who had recently personally observed Heuton's condition, did testify regarding that condition. *Id.* 541 at 365. So, it appears that Minnesota allows police officers to determine, without any input from medical professionals, whether a person is incapable of consenting to a blood test.

Finally, Appellant turns to the case *State v. Brewer*, 411 S.C. 401, 768 S.E.2d 656 (2015). Appellant argues that the *Brewer* case is applicable here because "To what issue, other than the fact that Appellant could not leave the hospital, might have the testimony [regarding Nurse Albright's determination] been relevant? The answer is none." The *Brewer* case is yet another criminal case, this time involving a person that was convicted of multiple charges in connection with the shooting of two individuals at a nightclub. In *Brewer* the State introduced an audiotaped recording of Brewer's interrogation. This audiotaped recording contained "interrogators' hearsay-laden questions and comments [and] was played for the jury," including statements that "many witnesses observed [Brewer] shoot both victims, which was true only with respect to the shooting of" one victims. Further, this interview contained numerous instances of the investigators telling Brewer he should "prove himself innocent" and Brewer repeatedly asking for the interview to stop. The question for the jury in the Brewer case was whether Brewer had shot the two victims. Thus, clearly, playing an audiotaped interview where investigators *repeatedly refer to and quote statements* (sometimes even false statements that a witness said "X") made by witnesses that did not testify at the trial would constitute hearsay, because the very issue before the jury, whether Brewer shot the two victims, was discussed in these references and quotes. As discussed above, that is simply not the case here. In this case, by statute, the scope of this hearing was limited to whether Appellant:

> (1) was lawfully arrested or detained;
> (2) was given a written copy of and verbally informed of the rights enumerated in Section 56-5-2950; [and]
> (3) refused to submit to a test pursuant to Section 56-5-2950;...

S.C. Code §56-5-2951(F). So, the issue before the factfinder[4] in this case was not whether Appellant was actually physically unable to provide an acceptable breath sample or not, but rather whether a licensed medical personnel determined that Appellant was physically unable to provide an acceptable breath sample.[5] By referring this Court to the

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[4] DMV would also point out that unlike criminal cases where the factfinder is typically comprised of a jury, the factfinder in implied consent cases are OMVH hearing officers that hear contested case hearings, including implied consent cases, as their full time job. Similar to a bench trial before a Circuit Court Judge, more lenience can be granted with regard to what evidence is admitted because, unlike a typical juror, an OMVH hearing officer is better equip, through their experience, to recognize which testimony is less factually reliable and should be taken with a grain of salt.

[5] During this part of his argument, Appellant asserts that Nurse Albright determined "that a blood test was warranted" (Brief of Appellant, p. 15). This is not an accurate statement. Nurse Albright merely determined that Appellant was physically unable to provide an acceptable breath sample. Officer Desrochers determined that he could request a blood sample from Appellant. Appellant makes the statement that Nurse Albright determined "that a blood test was warranted" because such an interpretation leads to the outcome Appellant seeks in this case, that Nurse Albright (and other similarly situated licensed medical personnel) be required to appear and testify in implied consent cases where a blood test is requested by the arresting officer and the driver refuses to consent to the test. Clearly, such a standard is not required, based on the limited scope of implied consent hearings, and is only pursued in an effort to get into testimony about whether the licensed medical personnel was correct that driver was physically unable to provide an acceptable breath sample or not. This is evidenced by Appellant's argument that Nurse Albright was not subject to cross examination regarding her determination that Appellant was physically unable to provide an acceptable breath sample. For example, Appellant's argument that he could not ask the following questions:

> It may be that the nurse was not informed of the time limit for a breath test. Could Appellant have been more expeditiously cared for and discharged had she known? Did the officer ask her to speed up the process or did the officer simply present a form for her to sign for his own convenience? Was Appellant released from the hospital in time to reasonably be offered a breath test?

(Brief of Appellant, pp. 15-16). This is further evidenced by Appellant's statement that if Nurse Albright's "alleged statements were false, then the decision to request a blood test is invalid..." (Brief of Appellant, p. 16). Based on these arguments and statements, it is clear Appellant is trying to expand the scope of the implied consent hearing beyond the bounds that have been set by the Legislature in S.C. Code §56-5-2951(F).

Brewer case, Appellant is attempting to muddy the waters and expand the scope of implied consent hearings so that when a licensed medical personnel determines someone is physically unable to provide an acceptable breath sample, that licensed medical personnel will then have to come testify at the implied consent hearing and prove that their determination was a true and correct determination.[6] This is simply not required by S.C. Code §56-5-2951(F). For these reasons, Appellant's reliance on the *Brewer* case is misplaced.

Should this Court find that the statements made by Nurse Albright are hearsay, the statements would still be admissible as an exception to the hearsay rule under Rule 803(4), SCRE. Further, the OMVH Hearing Officer could have allowed the statements and SLED Blood/Urine Collection Report for the limited purpose of medical treatment under Rule 803(4), SCRE. Appellant may argue that this rule applies only to words uttered to a medical provider by a patient, not by a medical provider to someone else, for example a law enforcement officer. Such an argument is not supported by the plain language of the rule, which does not limit the rule's use in that manner, and for that reason alone is meritless. See *State v. Burroughs*, 328 S.C. 489, 492, S.E.2d 408 (Ct.

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[6] In discussing the *Brewer* case, Appellant also cites to the cases *U.S. v. Silva*, 380 F.3d 1018, 65 Fed. R. Evid. Serv. 162 (7th Cir. 2004) and *State v. Miller*, 197 N.C.App. 78, 676 S.E.2d 546 (2009). In the *Silva* case, like the *Brewer* case, the testimony objected to by Silva went directly to the heart of the issue before the jury, whether Silva sold drugs to a DEA confidential informant through a supplier. Thus, for the same reasons the *Brewer* case is of no assistance to this Court, the *Silva* case is also of no assistance to this Court. Interestingly, Appellant cites to the *Miller* case, which actually held that in a murder trial questions from detectives to defendant, that included statements attributed to nontestifying third parties, were not hearsay because they were offered not for the truth of the matter asserted, but so that the jury could understand the circumstances in which the defendant was caught in a lie, changed his story, and made significant admissions of fact to the investigators. Thus, DMV asserts the *Miller* case actually supports the admission of Nurse Albright's statements.

App. 1997) ("Certainly, a statement [to nurse or doctor] that the victim had been raped or that the assailant had hurt the victim in a particular area would be pertinent to the diagnosis and treatment of the victim" and would, therefore, be admissible under Rule 803(4), SCRE).

Additionally, pursuant to Rule 16(B) and (D), OMVH Rules (available at http://www.scomvh.net) the record must contain all evidence received and considered, as well as evidence proffered, whether it is ultimately found objectionable or not. Thus, the OMVH Hearing Officer would have had to allow the statements and SLED Blood/Urine Collection Report into the record if proffered regardless of whether they were later found to be competent evidence.

Moreover, Appellant has offered no proof or argument that the OMVH Hearing Officer gave the statements or SLED Blood/Urine Collection Report any specific weight over other evidence nor any weight at all in the face of the other evidence demonstrating Appellant's implied consent violation.

In this regard, S.C. Code §1-23-380(A)(6) specifies that an appellate court can only reverse or modify the agency's determination when "substantial rights of the appellant have been *prejudiced* because the administrative findings, inferences, conclusions or decisions are [erroneous or illegal for various stated reasons]." Emphasis added. Even if the record contains error, the finding is not reversible unless a party was prejudiced. Appellant does not assert or argue that he was prejudiced was by the admission of Nurse Albright's statements or the SLED Blood/Urine Collection Report and for this reason the OMVH Hearing Officer's findings should be affirmed.

II. THE HEARING OFFICER WAS CORRECT IN RULING THAT THE ARRESTING OFFICER ESTABLISHED THAT THE INDIVIDUAL WHO

SIGNED THE URINE/BLOOD COLLECTION REPORT WAS A LICENSED MEDICAL PROFESSIONAL.

Appellant argues that the Administrative Law Judge "based his conclusion [that Nurse Albright was a registered nurse] upon Ms. [sic] Albright's alleged signature on the SLED Urine/Blood Collection Report; her representations to the arresting officer; her hospital scrubs[7]; and her name tag all of which constitute out of court statements used for the truth of the matter asserted." Contrary to this argument, Officer Desrochers' testimony regarding his observations of Nurse Albright are not hearsay, because they are not statements or they are not statements that go to the matter asserted in this case.[8] First, Nurse Albright's name badge and what was written on it, is not a statement in the sense put forth in Appellant's argument. Officer Desrochers testified to his observations of

[7] Appellant attempts to make an issue of whether Nurse Albright was wearing scrubs or not and whether Officer Desrochers testified Nurse Albright was wearing scrubs. It is clear from the testimony that Officer Desrochers never says whether Nurse Albright was wearing scrubs or not. Scrubs were discussed solely in regard to Appellant's objection to Officer Desrochers testimony regarding the statements made to him by Nurse Albright, specifically in reference to the holding in the case *State v. Frye*, 362 S.C. 511, 608 S.E.2d 874 (Ct. App. 2004). In *Frye*, a criminal driving under the influence case, the Court held that blood test results could not be admitted into evidence because the State did not have Scott Darragh testify to confirm that he was a licensed physician, registered nurse, or otherwise properly qualified under S.C. Code §56-5-2950 to perform the blood draw at issue. Rather, the State merely had testimony that Mr. Darragh was in the emergency room and wearing "generic hospital attire," i.e. scrubs. This case further went on to discuss that the "statutory mandate in question is inextricably connected to the accuracy and reliability of the blood test results" and remanded the case back to the trial court "to determine whether 'such failure materially affected the accuracy or reliability of the test results or the fairness of the testing procedure.'" *Id.* 362 at 518 and 519. (Emphasis added). It appears to the undersigned that the discussion regarding Appellant's objection under *Frye* is what led to the Administrative Law Judge to erroneously believe that Officer Desrochers testified that Nurse Albright was wearing scrubs. Further, despite Appellant's assertion that the OMVH Hearing Officer also relied on testimony that Nurse Albright was wearing scrubs, no such notation is found anywhere in the OMVH Hearing Officer's Final Order and Decision.

[8] Please see all of the arguments regarding hearsay and statements that "go to the matter asserted" as outlined in detail above.

Nurse Albright, including the fact that she had on a name badge that was consistent with the name tags issued by the hospital, that the name tag identified her as Nurse Albright, and that the name tag stated Nurse Albright was a registered nurse (ALC ROA, p. 14, lines 18-23).[9] Certainly, the hospital would not have issued Nurse Albright a name badge indicating she is a registered nurse if Nurse Albright is not a registered nurse. Such an action would risk the closure of the entire hospital, potential criminal charges, and would greatly increase the likelihood of liability to the hospital for any treatment performed under such a false name badge. Further, Officer Desrochers observed Nurse Albright perform duties typically performed by a registered nurse and observed Nurse Albright fill out the SLED Blood/Urine Collection Report line "Name and Title of Licensed Medical Personnel" with "Angela Albright, RN," and signed the SLED Blood/Urine Collection Report with "RN" just after her signature (ALC ROA, p. 59). Interestingly, the *Frye* case, which was relied on by Appellant in his original objection to Officer Desrochers testimony and in his Brief, specifically stated "Law enforcement officers may generally rely on the implicit and explicit assurances of medical providers regarding the qualifications or personnel who are assigned to assist them in their investigation." *Id.* 362 at 517. Despite this notation, Appellant essentially argues that Officer Desrochers could not rely on the implicit and explicit assurances of Nurse Albright regarding her qualifications. Further, in the *Frey* case, Scott Darragh merely "signed the form in the space labeled 'licensed or trained collector.' The report did not indicate Mr. Darragh's position and the State did not offer any evidence of Mr. Darragh's medical credential"

[9] Significantly, the testimony regarding the name tag was elicited by Appellant's Counsel and was not objected to by any party. For this reason, DMV asserts that any argument regarding the name tag is not preserved for appeal.

beyond the testimony that he was wearing scrubs (Brief of Appellant, p. 18). In this case, the OMVH Hearing Officer had quite a bit more evidence of Nurse Albright's credentials than the *Frye* Court had before it. Specifically, Officer Desrocher's observations of Nurse Albright performing duties typically performed by a registered nurse, Nurse Albright's name badge identifying her as a registered nurse, and Nurse Albright's indication that she was an "RN" on the SLED Blood/Urine Collection Report. Thus, even the *Frye* case, when paired with Officer Desrochers observations, supports Officer Desrochers reliance on Nurse Albright's determination that Appellant was physically unable to provide an adequate breath sample. As a result, all of these observations taken together provide the OMVH Hearing Officer a reasonable basis for finding that "the officer was advised by a registered nurse (licensed medical personnel) that the [Appellant] was physically unable to submit to a breath test" as Nurse Albright "held herself out to be a nurse, treated patients at the hospital, and... wore a name badge stating she was a registered nurse..." (ALC ROA, pp. 35 and 39). Further, the OMVH Hearing Officer specifically held,

> I conclude that the testimony [regarding Nurse Albright's determination that Appellant was physically unable to submit to a breath test] was not hearsay because it was not admitted to prove that the [Appellant] was actually unable to leave, only that the blood test was warranted because licensed medical personnel determined he was unable to provide a breath sample.

For the purposes of determining whether a blood sample was properly requested, the phrase "licensed medical personnel" means physicians licensed by the State Board of Medical Examiners, registered nurses licensed by the State Board of Nursing, and other medical personnel trained to take blood samples in a licensed medical facility. See *State v. Stacy,* 315 S.C. 105, 431 S.E.2d 640 (Ct. App. 1993). Despite Appellant's numerous

objections regarding Nurse Albright's determination that Appellant was physically unable to provide an adequate breath sample and the fact that it was abundantly clear that Appellant was aware that Nurse Albright had made that determination, the Appellant offered no evidence to refute Officer Desrocher's evidence that Nurse Albright was licensed medical personnel. It seems apparent that if the Appellant had any evidence that Nurse Albright was not a nurse, then Appellant would have confronted Officer Desrochers with that evidence. Appellant did not, however, even attempt to present conflicting evidence regarding Nurse Albright's credentials. With no conflicting evidence, the record supports the conclusion that Ms. Albright was a licensed medical professional. Because the record in this matter contains substantial evidence, upon which Officer Desrochers relied (that the determination that Appellant was physically unable to provide an adequate breath sample was made by a licensed medical personnel, i.e. Nurse Albright, and that the person who signed the SLED Blood/Urine Collection report was a licensed medical personnel, i.e. Nurse Albright), the OMVH Hearing Officer and ALC were correct to sustain this implied consent suspension. See *Lark v. Bilo, Inc.*, 276 S.C. 130, 276 S.E.2d 304.

CONCLUSION

For the reasons set forth above, the order of the ALC sustaining the order of the OMVH Hearing Officer should be affirmed.

[SIGNATURE ON THE FOLLOW PAGE]

Respectfully submitted,

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